LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 14 1967
JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 501

BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY IN OPPOSITION.

JAMES P. REEDY
Union Station Building
Chicago, Illinois 60606

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005
Of Counsel.

FRANCIS M. SHEA
RICHARD T. CONWAY
734 Fifteenth Street, N.W.
Washington, D.C. 20005

JAMES R. WOLFE
CHARLES I. HOPKINS, JR.
Union Station Building
Chicago, Illinois 60606
Attorneys for Respondent Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

INDEX

Table of Contents

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statement of the Case	2
Argument	9
Conclusion	13

Table of Citations

Cases:

Brotherhood of Loc. Fire. & Eng. v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D. D.C., 1964), aff'd *per curiam*, 331 F. 2d 1020 (D.C. Cir., 1964), cert. den., 377 U.S. 918 (1964)	3, 11
Brotherhood of Railroad Trainmen v. *Certain Carriers, Etc.*, 349 F. 2d 207 (D.C. Cir., 1965)	4
Brotherhood of Railroad Trainmen v. *Chicago, M., St. P. & P. R. Co.*, 345 F. 2d 985 (D.C. Cir., 1965)	4
Brotherhood of Railroad Trainmen v. *Missouri Pacific R. Co.*, 230 F. Supp. 197 (E.D. Md., 1964)	10
Commissioner v. *Sunnen*, 333 U.S. 591 (1948)	10
Heiser v. *Woodruff*, 327 U.S. 726 (1946)	10
Locomotive Engineers v. *B. & O. R. Co.*, 372 U.S. 284 (1963)	2
Locomotive Engrs. v. *L. & N. R. Co.*, 373 U.S. 33 (1963)	5
Mid-Continent Airlines v. *Brotherhood of Railway, Etc.*, 83 F. Supp. 976 (W.D. Mo., 1949)	4
New York, C. & St. L. R. Co. v. *Brotherhood of Loc. Fire. & Eng.*, 358 F. 2d 464 (6th Cir., 1966)	4
Opinion of Neutral Members, 41 Labor Arbitration 680 (1963)	12

Page

Order of Railroad Telegraphers v. *New York Central R. Co.*, 181 F. 2d 113 (2d Cir., 1950) . . . 4
Slocum v. *Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950) . . . 5

Statutes:

P.L. 88-108 (77 Stat. 132):

Section 3 . . . 3
Section 4 . . . 3, 10

Railway Labor Act:

Section 3 . . . 5, 6, 12
Section 6 . . . 2
Section 7 . . . 3, 4
Section 8 . . . 3, 4
Section 9 . . . 3, 6, 10, 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 501

BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY IN OPPOSITION.

Opinions Below

The opinion of the Court of Appeals (App. A of Petition), not yet officially reported, is unofficially reported at 55 CCH Labor Cases ¶ 11,931. The opinion of the District Court (App. C of Petition) is reported at 248 F. Supp. 1008.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Question Presented

Whether the ruling by Arbitration Board No. 282, in answer to BRT Question No. 33, that its Award does not bar unilateral changes in crew consist in situations where the carrier's rules prior to the Award did not require the use of a stipulated number of trainmen, is a permissible interpretation of the Award?

Statement of the Case

In November of 1959, most of the nation's Class I railroads served five unions (including petitioner) with notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156) of proposed changes in a number of obsolete rules which were causing serious overmanning of trains. One of the proposals thus made was to abolish all rules requiring the use of trainmen (such as brakemen and helpers) in road and yard service, and to permit management to determine the number of such trainmen to be used in its discretion. In September of 1960, the unions served the railroads with Section 6 notices of various counterproposals, including a proposal by petitioner to establish a rule requiring the use of at least two trainmen on all crews in road and yard service. The parties exhausted the "major" dispute procedures of the Railway Labor Act (45 U.S.C. §§ 151-160) without settling this dispute, and thus were in a position to resort to self help including strikes by the unions. See *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963).

To prevent such a disaster, Congress enacted P.L. 88-108 (77 Stat. 132). That statute committed the crew-consist issue raised by those aspects of the Section 6 notices referred to above and another issue involving the use of locomotive firemen to final and binding arbitration by an arbitration board commonly known as Arbitration Board No. 282. The crew-consist provisions of the Award by

Board 282 (JA 5-10) established a procedure whereby existing rules requiring a stipulated number of trainmen could be changed, with the exception of rules requiring the use of two trainmen in mainline road service.[1] Since the procedure was applicable only to proposed changes "in the scope or application of rules . . ., whether established by agreement, interpretation, or practice, which require a stipulated number of trainmen" (JA 5), in those situations in which no rule required the use of a stipulated number of trainmen on road or yard crews, the carrier could continue to change the number of trainmen on such crews in its discretion without going through the procedure established by the Award.

P.L. 88-108 provided, among other things, that the Award by Board No. 282 should constitute a "complete and final disposition" of the portions of the 1959 and 1960 Section 6 notices raising the crew-consist and firemen issues (§3), that the arbitration should "be conducted pursuant to sections 7 and 8 of the Railway Labor Act" (§4), and that "the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act" (§4). Petitioner and three other unions filed petitions to impeach the Award, pursuant to Section 9 of the Railway Labor Act (45 U.S.C. § 159) as incorporated into P.L. 88-108, and contended, among other things, that the crew-consist provisions of the Award did not constitute a "complete and final disposition" of the crew-consist issue within the meaning of that requirement in P.L. 88-108. That contention was rejected, however, and the validity of the Award was sustained. *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B.*

---

[1] In general, the procedure thus established permitted either a carrier or a union to give written notice of proposed changes, provided for conferences upon the proposals and, if no agreement was reached, for submission of the dispute to a special board of adjustment for final and binding decision pursuant to certain guidelines or standards set forth in the Award.

& Q. R. Co., 225 F. Supp. 11 (D. D.C., 1964), aff'd *per curiam*, 331 F. 2d 1020 (D.C. Cir., 1964), cert. den., 377 U.S. 918 (1964).

Section 8(m) of the Railway Labor Act (45 U.S.C. § 158 (m)) provides that "any difference arising as to the meaning, or the application of the provisions, of an award by a board of arbitration shall be referred back for a ruling to the same board . . .; and that such ruling when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award. . . ." See, also, 45 U.S.C. § 157 Third (c). It has been established that Section 8(m), as incorporated into P.L. 88-108, is applicable to Board 282 and its Award. *E.g., New York, C. & St. L. R. Co.* v. *Brotherhood of Loc. Fire. & Eng.*, 358 F. 2d 464 (6th Cir., 1966); *Brotherhood of Railroad Trainmen* v. *Certain Carriers, Etc.*, 349 F. 2d 207 (D.C. Cir., 1965); *Brotherhood of Railroad Trainmen* v. *Chicago, M., St. P. & P. R. Co.*, 345 F. 2d 985 (D.C. Cir., 1965). Hence, as those cases hold, issues as to the meaning or application of Award 282 must be initially decided by Board 282 rather than by the courts. And, unless impeached in the manner and within the time required by Section 9 of the Railway Labor Act, the rulings of Board 282 become a part of its "original award" with "the same force and effect as such original award." Such rulings should not be impeached unless inconsistent with any reasonable interpretation of the original award, so as to constitute an amendment thereof or a new award rather than an interpretation of the original award. *Order of Railroad Telegraphers* v. *New York Central R. Co.*, 181 F. 2d 113 (2d Cir., 1950); *Mid-Continent Airlines* v. *Brotherhood of Railway, Etc.*, 83 F. Supp. 976 (W.D. Mo., 1949).

As we have noted, on its face Award 282 requires that the procedures established therein be followed only with respect

to proposed changes in existing rules requiring the use of a stipulated number of trainmen on crews in road or yard service; where the existing rules leave the number of trainmen on such crews to managerial discretion, the carrier can continue to change the number of trainmen in the exercise of its discretion without going through the procedures established by the Award. Hence, when a dispute arises as to whether the existing rules require a stipulated number of trainmen or permit a carrier to change the number of trainmen in its discretion, the issue presented concerns the interpretation of the existing rules rather than the interpretation of Award 282. And, it has long been established that issues as to the interpretation of such rules are within the exclusive jurisdiction of the National Railroad Adjustment Board or a special board of adjustment established under Section 3 of the Railway Labor Act (45 U.S.C. § 153). *E.g., Locomotive Engrs.* v. *L. & N. R. Co.*, 373 U.S. 33, 38 (1963); *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950).

Shortly after Award 282 became effective (on January 25, 1964), a dispute arose between two unions (petitioner and the Order of Railway Conductors & Brakemen) and the respondent railroad as to whether respondent's rules in effect prior to the Award required a stipulated number of trainmen on certain crews. The unions contended that such a rule had been established by practice, and therefore that the number of trainmen on such crews should not be changed except pursuant to the Award. Respondent contended, on the other hand, that it had the right to change the number of trainmen on such crews in its discretion. The unions submitted this dispute to Board 282 (in three substantially identical questions) which ruled that it did not involve an interpretation of the Award, but rather an interpretation of the existing rules, and thus should be decided under the "minor" dispute procedures (Section 3) of the Railway Labor Act. Answers on May 17, 1964, to BRT Question No.

18 and to ORC&B Question No. 1; Answer, on June 9, 1964, to BRT Question No. 17 (JA 11-13; see JA 31-32).

Neither petitioner nor the ORC&B sought to impeach those rulings, so that they became a part of the Award (see p. 4, *supra*) and were "final and conclusive on the parties," 45 U.S.C. § 159 Second. Nevertheless, when a similar dispute subsequently arose between petitioner and the respondent railroad with respect to certain other crews, petitioner once again sought to have Board 282 decide the dispute rather than proceed under the procedures established pursuant to Section 3 of the Railway Labor Act, by submitting BRT Question No. 33 to the Board.

While BRT Question No. 33 was pending, petitioner filed a motion for supplemental relief against the respondent railroad under the judgment entered on Award 282 in the United States District Court for the District of Columbia (JA 22-23). Petitioner contended, in a supporting affidavit (JA 23-26), that a rule requiring a stipulated number of trainmen on certain crews had been established by practice, while opposing affidavits filed by respondent (JA 26-37) demonstrated that there was no such rule and that the number of brakemen to be used was determined by management in accordance with its judgment as to the needs of the service. In the course of argument upon that motion, however, petitioner contended for the first time that the Award should be interpreted as prohibiting any unilateral changes in crew consist even though a stipulated number of trainmen is not required by a rule established by practice or otherwise. This argument, which was based upon a contention that the Award had been so interpreted in the opinion of the District Court upholding the validity of the Award, did raise an issue as to the interpretation of Award 282.

Consequently, the District Court withheld any ruling upon the motion for supplemental relief pending a ruling by Board 282 upon the issue thus raised by petitioner (JA

43), and, on August 11, 1965, petitioner submitted a Supplemental Filing to Board 282 in which the Board was requested to rule upon that issue in its answer to BRT Question No. 33.[2] In its Answer, on October 10, 1965, to BRT Question No. 33 (App. D to Petition; JA 65-66), the Board ruled, among other things, that:

> "Section III, Part A(2) of the Award bars changes in the scope or application of 'rules' in effect immediately prior to the effective date of this Award requiring a stipulated number of trainmen, whether such 'rules' were established by agreement, interpretation or practice. Where no such 'rule' was in effect immediately prior to the effective date of the Award, this bar does not apply."

The Board also ruled that it did not construe the statements in the opinion upholding the Award "as a holding to the contrary" of its view that the bar in Section III-A(2) of the Award "is applicable only to situations in which there were rules in effect immediately prior to the effective date of the Award which required a stipulated number of trainmen." And, the Board reiterated its earlier ruling in "answer to B.R.T. Question 18, [that] the question of whether such a rule was or was not in effect immediately prior to the effective date of the Award raises an issue to be determined under existing procedures of the Railway Labor Act for the settlement of 'minor' disputes."

On October 20, 1965, shortly before filing a petition to impeach the Answer to BRT Question No. 33 (on October 22, 1965), petitioner moved for a further hearing on its

---

[2] The "Supplemental Filing" by petitioner is in the record as Exhibit D to the Affidavit of Richard T. Conway, filed on December 30, 1965. Petitioner conceded therein (page 1) that its contention as to the interpretation of the Award was contrary to a "literal reading" of the Award and of the Board's prior Answer to BRT Question No. 18.

motion for supplemental relief, which motion was said to be "ripe for further hearing, consideration, and adjudication in the light of the said Answer, the earlier hearing, and the briefs and affidavits heretofore filed" (JA 107-108). Petitioner thus elected to have its motion for supplemental relief decided prior to a determination of the impeachment petition, even though the District Judge made clear at the outset that in such circumstances he was required to enforce the Award as interpreted by the Board in its Answer to BRT Question No. 33 (JA 119-120). Since to "grant the relief asked for" in the motion "would be, in effect, setting aside or ignoring the answer" to BRT Question No. 33 (JA 124), the motion was denied (JA 124-125). In the course of the hearing upon the motion, the District Judge made clear that he had not intended, in his opinion upholding the Award, to interpret the Award in the manner contended by petitioner (JA 120-122).

The petition does not raise any issue concerning the order denying the motion for supplemental relief, which order also was not questioned in petitioner's brief in the Court of Appeals (although an appeal was noted). Rather, the petition is concerned solely with a subsequent order by the District Court (JA 159-160) upholding the answer to BRT Question No. 33 (and also the answers to BRT Questions No. 32(c) and (d) and 36), and with the affirmance of that order by the Court of Appeals. In its opinion, the Court of Appeals pointed out that there "is obviously no difference between the Award and the Board's interpretation of it" (Pet., App. A, at 2a) as barring changes only in rules requiring a stipulated number of trainmen (except pursuant to the procedures established by the Award), rather than as barring changes in crew consists even where there is no such rule. And, the court below rejected petitioner's contention that the opinion upholding the validity of the Award had construed the Award to the contrary (*id.*, at 2a-3a).

Argument

The court below noted that "this case is merely the latest manifestation of a litigation syndrome that seems to keep the railroads and various governmental entities in the courts on an ancient issue" (Pet., App. A, at 1a). The symptoms of petitioner's "litigation syndrome" apparently have become even more manifest. Petitioner has filed two petitions for writ of certiorari from the judgment in the proceeding below—this petition and No. 500. Both of those petitions appear to us to be without substance, as we demonstrate herein with respect to the instant petition.

Petitioner does not even raise in this Court the issue which it pressed below—whether or not Board 282 properly interpreted the language of its Award by its ruling, in answer to BRT Question No. 33, that the requirement that no changes be made in the existing rules requiring a stipulated number of trainmen except pursuant to the procedures established by the Award did not bar changes in the consist of crews as to which the existing rules did not require a stipulated number of trainmen. Instead, petitioner requests this Court to grant certiorari to review a contention that the Award as so interpreted is invalid because it does not comply with P.L. 88-108.

One can understand why petitioner has not raised here the issue which was pressed below. As the court below pointed out in effect, Board 282 simply interpreted its Award to mean exactly what it says. Section III-A(2) of the Award provides that no "change shall be made in the scope or application of rules in effect immediately prior to the effective date of this Award . . . which require a stipulated number of trainmen . . ., except by agreement or pursuant to the provisions of this Award" (JA 5). Thus, it has always been plain that where "no 'rule' was in effect immediately prior to the effective date of this Award, this bar does not apply" as Board 282 stated in its Answer to BRT Question No. 33. See pp. 3, 4-6, *supra*.

The issue as to the validity of the Award which petitioner seeks to raise in this Court, however, is equally insubstantial. Under Section 9 Second of the Railway Labor Act, as incorporated in Section 4 of P.L. 88-108, issues as to the validity of the Award had to be raised in an impeachment petition filed within 10 days after the Award was filed with the district court.[3] As noted in our Statement of the Case (pp. 3-4 *supra*) petitioner and the other unions did seek to impeach the validity of the Award. One of the contentions made then, as now, was that the Award did not make a "complete and final" disposition of the crew-consist issue as required by P.L. 88-108, although at that time petitioner based that contention upon the provisions in the Award permitting rules requiring a specified number of trainmen to be changed in accordance with procedures specified in the Award.

As we have noted (p. 3, *supra*) the petition to impeach the Award was denied and the validity of the Award under P.L. 88-108 and otherwise was upheld in a decision which became final in 1964. That decision, consequently, is *res judicata* of all issues as to the validity of the Award whether or not raised at the time. See, *e.g.*, *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-598 (1948); *Heiser* v. *Woodruff*, 327 U.S. 726, 735-736 (1946). A ruling by Board 282 as to the meaning of its Award is subject to impeachment if that ruling is not a reasonable interpretation of the language of the Award. See p. 4, *supra*. But the validity of the Award itself is no longer subject to question. See *Brotherhood of Railroad Trainmen* v. *Missouri Pacific R. Co.*, 230 F. Supp. 197, 201 (E.D. Mo., 1964). Indeed, the court below so held

---

[3] "An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties." 45 U.S.C. § 159 Second.

(Pet. App. A., at 3a-4a) with respect to that aspect of the case which has been made the subject of the petition in No. 500.[4]

In any event, Award 282 obviously disposed of the crew-consist aspects of the 1959 and 1960 notices insofar as they concerned those situations in which the existing rules did not limit the discretion of a carrier in fixing the consist of its crews. The Award did so by preserving those situations just as it did with respect to situations in which the existing rules required the use of two trainmen on mainline road crews (an aspect of the Award favorable to petitioner). It obviously was not unreasonable for Board 282 to decide that permitting a carrier to continue to change the consist of crews in its discretion is consistent with "adequate and safe transportation on service" where a carrier had been exercising such discretion for many years prior to the Award, but in any event petitioner's contentions in that regard (Pet., at 5) are irrelevant since the merits of the substantive provisions of the Award are not subject to judicial review at any time, as 45 U.S.C. § 159 Second expressly provides. *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11, 17-18 (D.D.C., 1964), aff'd *per curiam*, 331 F. 2d 1020 (D.C. Cir., 1964), cert. den., 377 U.S. 918 (1964). And, of course, a dispute as to whether or not the rules in effect prior to the Award required the use of a stipulated number of trainmen involves an interpretation of those rules, rather than of the Award, as Board 282 has repeatedly held. See pp. 5-6, *supra*.

We submit, therefore, that the judgment below is clearly correct. But even if there should be some doubt about the correctness of that judgment, petitioner does not even claim that it conflicts with a decision of this Court or of some other

---

[4] Petitioner did contend in the court below that the Award as interpreted by the ruling of Board 282 involved in that aspect of the case was invalid.

court of appeals and the issue presented does not possess any general importance such as might justify an exercise of the Court's discretionary certiorari jurisdiction. In their opinion concerning the Award, the Neutral Members of Board 282 noted that only "a relatively few carriers are unrestricted in determining the size of crews. . . ." *Opinion of Neutral Members*, 41 Labor Arbitration 680, 693 (1963). And, of course, the Award by Arbitration Board No. 282 was tailored to the particular circumstances presented to that Board, so that there is no likelihood that similar issues will arise out of some future arbitration award as petitioner speculates (Pet., at 4).

Finally, petitioner always has possessed an adequate remedy for its basic contention that respondent's rules require the use of a stipulated number of trainmen on the crews in question. Not only could its claims in that regard have been submitted to the National Railroad Adjustment Board, but there also has been available a special board of adjustment established by the parties on the property of the respondent railroad pursuant to 45 U.S.C. § 153 Second. Respondent has repeatedly offered to join with petitioner in obtaining an expedited determination of the merits of its claim by that means (see JA 31), but petitioner has refused even to file a claim. If petitioner had taken advantage of that offer and a final determination had been reached that respondent is required by its rules to use a stipulated number of trainmen on the crews in question, respondent would have been required to use such number of trainmen on those crews and to compensate in damages any employee who submitted a timely claim and established that he was injured by past failures to use that number of trainmen. Petitioner's refusal to utilize that remedy indicates very strongly that petitioner has no confidence in its claim that respondent's rules require the use of a stipulated number

of trainmen on the crews in question—a lack of confidence which we believe is more than justified.

Conclusion

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES P. REEDY
Union Station Building
Chicago, Illinois 60606

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005
Of Counsel.

FRANCIS M. SHEA
RICHARD T. CONWAY
734 Fifteenth Street, N.W.
Washington, D.C. 20005

JAMES R. WOLFE
CHARLES I. HOPKINS, JR.
Union Station Building
Chicago, Illinois 60606
Attorneys for Respondent Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

(2422-4)